

No. 34160-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

Lori Maze and Debra Tsugawa,

Appellants,

v.

Country Mutual Insurance Company,

Respondent.

FILED
COURT OF APPEALS
DIVISION II
06 APR 19 PM 12:58
STATE OF WASHINGTON
BY Ka
CLERK

RESPONDENT'S BRIEF

Beth Cupani OSB #96053
Pro Hac Vice Application Pending
Deborah L. Carstens WSBA #17494
BULLIVANT HOUSER BAILEY PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930
Facsimile: 206.386.5130
Attorneys for Respondent

90/8/14 wjd

ORIGINAL

TABLE OF CONTENTS

	Page
I. ASSIGNMENT OF ERROR	1
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
III. STATEMENT OF THE CASE	2
A. Factual Background	2
B. Procedural Background	2
IV. SUMMARY OF ARGUMENT	4
V. ARGUMENT	5
A. Standard of Review	5
B. The trial court did not abuse its discretion in dismissing Maze's case.	5
C. The trial court did not abuse its discretion in denying Maze's motion to vacate the order of dismissal.	10
VI. CONCLUSION	13

TABLE OF AUTHORITIES

	Page
Cases	
<i>City of Bellevue v. Kravik</i> , 69 Wn. App. 735, 850 P.2d 559 (1993)	8
<i>Davis v. Globe Mach. Mfg. Co.</i> , 102 Wn.2d 68, 684 P.2d 692 (1984)	8
<i>Engleson v. Burlington N. R.R. Co.</i> , 972 F.2d 1038 (9th Cir. 1992).....	11
<i>Horne v. Aune</i> , 130 Wn. App. 183, 121 P.3d 1227 (2005)	8
<i>In re Marriage of Thurston</i> , 92 Wn. App. 494, 963 P.2d 947 (1998)	11
<i>In re the Marriage of McLean</i> , 123 Wn.2d 301, 937 P.2d 602 (1997).....	10
<i>Luckett v. Boeing Co.</i> , 98 Wn. App. 307, 989 P.2d 1144 (1999)	12
<i>Nevers v. Fireside, Inc.</i> , 133 Wn.2d 804, 947 P.2d 721 (1997).....	5
<i>Smith v. Stone</i> , 308 F.2d 15 (9th Cir. 1962)	11
<i>Snohomish County v. Thorp Meats</i> , 110 Wn.2d 163, 750 P.2d 1251 (1988).....	9
<i>Sprague v. Sysco Corp.</i> , 97 Wn. App. 169, 982 P.2d 1202 (1999)	5
<i>Vaughn v. Chung</i> , 119 Wn.2d 273, 830 P.2d 668 (1992).....	8
Statutes and Rules	
Clark County Local Rule 10(3)(c).....	7, 8
CR 11	7, 8
CR 41(b)(1)	9

CR 41(b)(2)	1, 6
CR 41(b)(2)(A)	5, 8
CR 41(b)(2)(B).....	1, 6, 9
CR 60	13
CR 60(b).....	10, 11
CR 60(b)(1)	1, 4, 10, 11, 13
RAP 10.4(f)	6

I. ASSIGNMENT OF ERROR

Appellants, Lori Maze and Debra Tsugawa (collectively “Maze”), assign error to the trial court’s September 23, 2005, Final Order Denying Reinstatement of Case. Maze also assigns error to the trial court’s November 10, 2005, Order Denying Plaintiffs’ Motion for Relief from Order Denying Reinstatement of Case.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court dismissed Maze’s case under CR 41(b)(2) because no action had occurred in the case for nearly two years. CR 41(b)(2)(B) provides that a party who does not receive the clerk’s notice of impending dismissal shall be entitled to have the case reinstated. Maze did not receive notice of the impending dismissal because she neglected to properly inform the trial court of her correct address. Did the trial court abuse its discretion in dismissing the case?

2. CR 60(b)(1) allows the court to relieve a party from a final judgment for “mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or

order[.]” Did the trial court abuse its discretion in ruling Maze’s failure to keep the court informed of her current address did not constitute “excusable neglect?”

III. STATEMENT OF THE CASE

A. Factual Background

This matter arises out of an arson fire that occurred on June 13, 2001, at Maze’s residence. (CP 25) After a thorough investigation of the circumstances surrounding the loss, respondent, Country Mutual Insurance Company (“Country Mutual”) concluded Maze concealed material facts and intentionally set the arson fire. (*Id.*) Country Mutual denied Maze’s claim in February 2002. (*Id.*)

B. Procedural Background

Maze filed this action in Clark County Superior Court on July 15, 2002, alleging breach of contract, bad faith, and violation of the Consumer Protection Act. (CP 3) In her complaint, Maze listed her address as “8407 NE 164th St, Vancouver, WA 98662.” (CP 6) Country Mutual filed its Answer on August 28, 2002. (CP 7)

On June 18, 2004, nearly two years after Maze filed her first and last pleading in the matter, the Clark County Superior Court Clerk filed the Clerk's Notice of Dismissal for Want of Prosecution. (CP 13) The clerk mailed the notice to the address listed by Maze in her summons and complaint. (CP 2, 6) The clerk's file contains a copy of the properly-addressed envelope with a stamp from the post office stating "Undeliverable as addressed, Unable to Forward, Return to Writer." (CP 15) The trial court signed an Order of Dismissal for Want of Prosecution on July 29, 2004. (CP 19)

Nearly one year later, on June 29, 2005, Maze filed a Motion for Reinstatement of Case. (CP 22) The trial court denied Maze's motion by order dated September 23, 2005. (CP 47) The trial court found that Maze failed to file a single pleading in the two years following the filing of the Complaint. (CP 48) The court also found that Maze had the obligation to keep the court informed of her current address and inexcusably failed to do so. (*Id.*)

Maze filed a Motion for Relief from Order Denying Reinstatement Case. (CP 24A) The trial court denied Maze's motion. (CP 62) This appeal follows.

IV. SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in denying Maze's motion to reinstate her case after finding Maze was responsible for her failure to receive the clerk's notice of the impending dismissal. Maze did not give the court a correct mailing address and, consequently, failed to receive the clerk's notice. The trial court properly concluded that Maze's unjustified failure to inform the court of her accurate mailing address as required by the rules was not grounds for reinstatement, and was not a basis under CR 60(b)(1) for vacating the court's order denying reinstatement.

V. ARGUMENT

A. Standard of Review

The trial court's interpretation of a court rule is a question of law, subject to de novo review.¹ A trial court's decision regarding the application of civil rules to a particular case is reviewed for abuse of discretion.²

B. The trial court did not abuse its discretion in dismissing Maze's case.

The trial court dismissed Maze's lawsuit pursuant to CR 41(b)(2)(A), which provides:

Notice. In all civil cases in which no action of record has occurred during the previous 12 months, the clerk of the superior court shall notify the attorneys of record by mail that the court will dismiss the case for want of prosecution unless, within 30 days following the mailing of such notice, a party takes action of record or files a status report with the court indicating the reason for inactivity and projecting future activity and a case completion date. If the court does not receive such a status report, it shall, on motion of the clerk, dismiss the

¹ *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997).

² *Sprague v. Sysco Corp.*, 97 Wn. App. 169, 171, 982 P.2d 1202 (1999).

case without prejudice and without cost to any party.

It is undisputed that Maze did not file any pleadings in the case after filing her complaint in July 2002.³ It also is undisputed that, at the time she moved to dismiss this case, no action of record had occurred during the previous 12 months. Accordingly, dismissal was appropriate under CR 41(b)(2).

Maze contends, however, that she is entitled to reinstatement of the case pursuant to CR 41(b)(2)(B), which states:

Mailing Notice; Reinstatement. The clerk shall mail notice of impending dismissal not later than 30 days after the case becomes eligible for dismissal because of inactivity. A party who does not receive the clerk's notice shall be entitled to reinstatement of the case, without cost, upon motion brought within a reasonable time after learning of the dismissal.

³ In her opening brief, Maze asserts she has not been idle in the case and describes various activities she has engaged in. *See* Brief of Petitioners at 3-4. This assertion is not relevant. Nor is it supported by any evidence or a reference to the record, as required by RAP 10.4(f), and it therefore should not be considered.

The trial court concluded this provision did not mandate reinstatement because Maze's failure to receive the notice of impending dismissal was caused by her own failure to properly notify the court of her correct address, as required by state and local court rules applicable to pro se parties like Maze. CR 11 states, "A party who is not represented by an attorney shall sign and date the party's pleading, motion or legal memorandum and state the party's address." In addition, Clark County Local Rule 10(3)(c) requires a pro se party to inform the court of the party's accurate mailing address: "Pro se pleadings . . . shall contain the party's mailing address and street address where service of process and other papers may be made upon him/her or the same may be rejected for filing by the clerk."

Maze's complaint, the only pleading she filed with the trial court, did not include her correct mailing address. The trial court properly recognized that Maze was not entitled to reinstatement because her failure to receive the notice of impending dismissal was caused by her own error

in properly notifying the court of her correct address.⁴

In construing rules, the courts use the same principles as they do in construing statutes.⁵ The court should consider not only the plain language of the rule at issue, but also the language and underlying policy of related rules, as well as the civil rules as a whole.⁶ Implicit in CR 41(b)(2)(A) is a party's obligation to provide the court with an accurate mailing address to which the notice of impending dismissal can be mailed. In this case, the trial court clerk properly addressed and mailed the notice of dismissal to Maze, but she failed to receive it because she did not notify the court of her correct mailing address as required under the civil rules. CR 11 and LR 10(3)(c)

⁴ Cf. *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984) (party cannot properly seek review of an alleged error which the party invited); *Horne v. Aune*, 130 Wn. App. 183, 191 n.2, 121 P.3d 1227 (2005) (under invited error doctrine, party may not set up an error at trial and then complain of it on appeal); *City of Bellevue v. Kravik*, 69 Wn. App. 735, 739, 850 P.2d 559 (1993) (doctrine of invited error prevents a party from arguing on appeal about an issue it created at trial).

⁵ *Vaughn v. Chung*, 119 Wn.2d 273, 282, 830 P.2d 668 (1992).

⁶ *Id.*

place the responsibility on Maze to inform the court of a change of address during pending litigation. Because she neglected to do so, Maze made it impossible to receive the notice of dismissal because of her own lack of due diligence in prosecuting her case, and her own disregard of the civil rules. The trial court properly concluded that Maze, not the court, bears the burden of making sure the court has her accurate mailing address.⁷

Further, Maze's due process argument is also meritless. Maze argues that the trial court violated her due process rights because she failed to receive notice of the dismissal. Due process does not require that an addressee actually receive the notice; it only requires that the court

⁷ It also should be noted that the trial court has inherent authority to dismiss a case for want of prosecution unless a court rule or statute specifically divests the court of that authority. *See Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 166, 750 P.2d 1251 (1988) (court's inherent authority superseded where CR 41(b)(1) precluded dismissal if case noted for trial before hearing on motion to dismiss). Here, even assuming CR 41(b)(2)(B) required the court to reinstate Maze's case, that rule does not (unlike CR 41(b)(1)) prevent the court from then dismissing the case based upon Maze's failure to prosecute. This is essentially what the court did in denying Maze's motion for reinstatement.

give notice that is reasonably calculated to apprise the party of the opportunity to be heard.⁸ Where the trial court properly mailed the notice to the addressee's last known mailing address, as it did here, there is no due process violation.

C. **The trial court did not abuse its discretion in denying Maze's motion to vacate the order of dismissal.**

CR 60(b)(1) allows the court to vacate an order for "mistakes, inadvertence, surprise, [or] excusable neglect[.]" The motion must be made no later than one year after the dismissal and must be within a "reasonable time."⁹ The trial court denied Maze's motion because (1) her failure to inform the court of her correct mailing address did not constitute excusable neglect, and therefore was not a basis for reinstatement of her case, and (2) the motion was untimely.

⁸ *In re the Marriage of McLean*, 123 Wn.2d 301, 937 P.2d 602 (1997).

⁹ CR 60(b).

Maze argues that the trial court should have vacated the order of dismissal under CR 60(b)(1) because she was unaware of how to change her address with the court.¹⁰ Therefore, Maze argues, her own “mistake” or “excusable neglect” is a basis for the court to vacate its order of dismissal. Maze’s argument that she was ignorant of the requirement to file a change of address form with the court must fail. Ignorance or carelessness of a party is not a basis for relief under CR 60(b)(1).¹¹

Also, a motion under CR 60(b)(1) must be made within a “reasonable time.” The trial court determines whether the motion is timely filed based on the facts and circumstances of each case.¹² In determining whether a motion is filed in a “reasonable time,” the trial court will consider the period between when a moving party became

¹⁰ Brief of Petitioners at 7.

¹¹ *Engleson v. Burlington N. R.R. Co.*, 972 F.2d 1038, 1043 (9th Cir. 1992); *Smith v. Stone*, 308 F.2d 15, 18 (9th Cir. 1962) (attorney’s failure to follow court rules is not excusable neglect under Rule 60(b)).

¹² *In re Marriage of Thurston*, 92 Wn. App. 494, 500, 963 P.2d 947 (1998).

aware of the judgment and the filing of the motion.¹³

Primary considerations in determining whether a motion is timely filed are whether the nonmoving party has suffered prejudice because of the delay and whether the moving party has good reasons for failing to take action sooner.¹⁴

In this case, the order of dismissal was signed on July 29, 2004, and filed in the Clerk's office on July 30, 2004. Maze filed her motion for reinstatement on June 29, 2005. Although Maze claims she did not discover that the action had been dismissed until June 26, 2005, the reasons for her lack of discovery are her own failure to (1) timely prosecute this matter and (2) inform the court of her new address. Maze took no action after filing her complaint over two years before the dismissal; she failed to file a single pleading since July 15, 2002.

Maze could have discovered that her case had been dismissed for want of prosecution many months before she

¹³ *Luckett v. Boeing Co.*, 98 Wn. App. 307, 312, 989 P.2d 1144 (1999).

¹⁴ *Id.*

did had she exercised even the slightest amount of diligence in prosecuting this lawsuit. Further, Country Mutual has been prejudiced by the delay because the incident underlying this lawsuit occurred nearly five years ago, and its ability to defend this case has been inevitably compromised by the passage of time. Maze's motion was not filed within a "reasonable time" as required under CR 60.

The trial court found that Maze inexcusably failed to provide the court with her current mailing address, despite her duty to do so under the civil rules. Further, it was not timely filed. Accordingly, the trial court did not abuse its discretion in denying Maze's motion under CR 60(b)(1).

VI. CONCLUSION

For the reasons set forth above, Country Mutual respectfully requests that the trial court's September 23, 2005, order denying Maze's motion for reinstatement of case and the November 10, 2005, order denying Maze's

motion for relief from the order denying reinstatement of
case be AFFIRMED.

DATED this 18th day of April, 2006.

BULLIVANT HOUSER BAILEY PC

By  #14101
for Beth Cupani OSBL#96053
Pro Hac Vice Application Pending
Deborah L. Carstens WSBA #17494

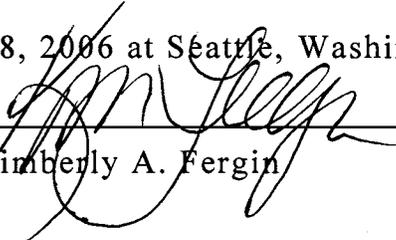
Attorneys for Respondent, Country
Mutual Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2006, a true and correct copy of the foregoing document was served on the following:

Debra Tsugawa PO Box 2372 Battle Ground, WA 98604	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery
Lori Maze PO Box 2372 Battle Ground, WA 98604	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery

Dated April 18, 2006 at Seattle, Washington.



Kimberly A. Fergin

3488800.1

FILED
COURT OF APPEALS
MAY 1 2006
06 APR 19 PM 12:58
STATE OF WASHINGTON
BY _____
DEPUTY